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Anger, Gender, Race, and the Limits of Free Speech Protection

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Abstract

Individuals' mental states are relevant to many processes in America's legal system, from finding parties had consciousness of guilt to determining damages for tort victims' pain and suffering. Under the First Amendment, emotions are taken into consideration for assessing the boundaries of free speech rights. Among the essential emotions affecting analyses of free speech rights—and limitations—is anger. This essay examines how First Amendment jurisprudence grapples with anger in two free speech contexts: the "fighting words" doctrine under *Chaplinsky* and the "incitement" doctrine under *Brandenburg*. The analysis finds a baseline definition of anger that is subtly, yet importantly, gendered and racialized. For the "dormant" *Chaplinsky* doctrine, troubling questions of systematic bias may be limited; however, anger's conceptualization produces more-serious concerns under *Brandenburg*. It concludes with recommendations for constitutional law scholars and practitioners working to vindicate broader First Amendment protections irrespective of gender, race, and other individual positionalities.

I. INTRODUCTION

Like other areas of American law and jurisprudence, free speech rights under the First Amendment use emotions as essential indicia in analyses of claims, including those concerning individual rights. Anger is understood to affect individuals in a particularly powerful way. Typically, American constitutional law understands it as a combination of instinctual and cognitive-rationalist sensations at the individual level, reflecting perspectives from Roman Stoic Seneca to the modern works of Martha Nussbaum. In this generalized view, people may experience anger when engaged in speaking or listening—and often *will* experience it in the

contentious debates of modern society—but can manage to curb most impulses to lash out (i.e., violently), at least most of the time.

Yet, First Amendment jurisprudence permits some exceptions to the broad sweep of free speech rights at least in part with anger in mind. Two of these doctrines hold that certain speech does not receive protection under the First Amendment: situations where the speech is so patently offensive as to constitute "fighting words," i.e., statements likely to induce a listener to move to censure the speaker; and situations where the speech is meant to and likely will incite listeners to heed a call to join the speaker, i.e., statements intended to command others to engage in "imminent lawless action." These scenarios correspond to doctrines established in the landmark cases of *Chaplinsky v. New Hampshire* and *Brandenburg v. Ohio*, respectively. Both doctrines recognize the potential for anger to override rationality and restraint, carving out room for the state to prevent or terminate unprotected speech perceived as especially likely to produce those results.

Per those examples, First Amendment jurisprudence echoes well Nussbaum and others' work on emotions, and especially their framing of anger, in direct, face-to-face speech contexts. This essay challenges those streams of work, drawing heavily from critical legal studies (CLS), including feminist and critical race theorists work in U.S. constitutional law, to highlight the ways in which these understandings of anger are limited. Ultimately, these doctrines give only a partial view of anger – and the ways in which anger is understood and permitted to be expressed produce concrete inequalities. These doctrines also conflate distinct forms of *ressentiment* and resentment with anger, and free speech jurisprudence as a whole takes for granted an overly narrow, context-less view of "objective" anger. The way anger is understood, and can be expressed given prevailing social norms and legal tests, essentially erases individuals and groups (e.g., women, nonwhite and queer/LGBTQ+ people, and others) who face unequally distributed constraints on expressing certain emotions, or *how* they are permitted to express them, in public settings. Finally, this essay juxtaposes *Chaplinsky*'s "fighting words" doctrine with "incitement" under *Brandenburg*, which share a common conceptual framework for understanding anger as a politically volatile emotion, yet present distinct normative and strategic concerns from a CLS perspective. This essay concludes with a summary and discussion of these phenomena as they concern First Amendment scholarship and jurisprudence, providing some suggestions for subsequent research pushing toward achieving more-flexible, truly expansive free speech protections.

II. EMOTIONS IN AMERICAN POLITICAL AND LEGAL LIFE

A. Martha Nussbaum's Cognitivist Framework for Understanding Emotions in Political and Legal Contexts

Emotions can be defined on various grounds: their psychological or environmental origins, their effects on the individual experiencing them, their rationality (or irrationality), and so on.[1] In American legal and political contexts, however, Martha Nussbaum's reconceptualization of the Stoics most clearly captures the idea of emotions as "forms of *evaluative judgment* that ascribe great importance to things and persons outside one's control."[2] In this "cognitivist" understanding, emotions are not "thoughtless natural energies," but rather are tied to an object—for instance, to another person or to a thing, even a situation—and are felt about that object, with intention, i.e., because of one's individual, subjective relationship to the referent object.[3] At the same time, Nussbaum's cognitivist view raises the question of exceptions. Reflecting on her own experience with intense grief after the sudden passing of her mother, for instance, Nussbaum described a seemingly "kinetic and affective aspect to emotion that does not look like a judgment or any part of it."[4] This, too, is folded into the reasoning capacity of the individual in question, and Nussbaum clarifies the *simultaneity* of these processes—an individual experiencing an intense emotional state is not "coolly" contemplating how to respond to an emotion-producing object-stimulus, but rather experiences the recognition and the internal "upheaval" altogether in one complex response.[5] The "kinetic" and the rational judgment are linked, not competing, facets of a unified experience.

Altogether, this rational-cognitivist model explains emotions as originating from a cogent, systematic response to some outside stimulus. Thus, human emotions—glee, fear, grief, rage—all flow from this general internal framework, irrespective of the specific situations or stimuli giving rise to them. For present purposes, the emotions undergirding individual expression, encompassed in concepts relating to free speech in U.S. constitutional law, often are understood in similar terms. From denouncing politicians and parties or mourning an electoral defeat to the passions

1. *See* Part II(B), *infra*, for an overview of the limited, legal scope considered herein.

2. Martha Nussbaum, *Emotions as Judgments of Value and Importance* 185 (2004), *in* ROBERT C. SOLOMON (ed.), THINKING ABOUT FEELING: CONTEMPORARY PHILOSOPHERS ON EMOTIONS (hereinafter "THINKING ABOUT FEELING") (emphasis added).

3. *Id.* at 188. Nussbaum elaborates further, discussing the complexity of emotions and their relation to one's *valuation* of an object. *Id.* at 276. In her chapter, Nussbaum powerfully begins by exploring her emotions as she raced toward her ailing mother's bedside, only to arrive too late; her mother had passed briefly before Nussbaum made it. The object (her mother) for the author's emotions brings her conceptualization vividly to life. *Id.* at 189.

4. Nussbaum, *supra* note 2, at 281.

5. *Id.* at 281–82.

underlying protest marchers' shouted slogans and homemade signs, external actors and events may be seen as responses which combine the kinetic and the rational.

B. Emotions in the Legal System: Embracing the Cognitivist View

As Nussbaum observes, the American legal system generally embraces the cognitivist view sketched above.[6] But law's understanding of emotion adds a normative overlay, a complex of presumptions constraining judges and juries' evaluations, in which, Nussbaum summarizes, "the prevailing attitude to emotions in general in the Anglo-American legal tradition … as we shall see, connects emotions closely with thought about important benefits and harms, and thus, as well, with prevailing social norms concerning what benefits and harms are rightly thought important."[7]

Hence, while one can distinguish emotions from "bodily appetites such as hunger and thirst," as well as "from objectless *moods*, such as irritation and certain types of depression,"[8] emotions are evaluated *legally* within social norm-based bounds: judges and juries, like all people, may consider another person to be "overreacting" to something, i.e., they evaluate the *reasonableness* of others' emotional responses.[9] In law, this serves a functional need since, absent this allowance for assessing the quality of individual emotional states, entire swaths of legal doctrine—like a defendant's *mens rea* ("state of mind") or a plaintiff's claims for damages predicated on "pain and suffering"—would fall away. In fact, it would be difficult to imagine many modern legal doctrines without a framework for "appraisals of evaluative beliefs."[10] The question, however, turns to the appropriateness and usefulness of the present model for doing so.

C. Seneca to SCOTUS: On Anger and *Ressentiment* in Life and Law

Like other human emotions, anger has a cognitive logic and a socially defined set of norms surrounding it, no less in formal jurisprudence than in society at large.[11] This modern framework has deep roots. Two millennia ago, Seneca described anger as "the most hideous and frenzied of all the emotions," a feeling "all excitement and impulse" and "greedy for vengeance," as a "brief insanity."[12] Seneca noted its ubiquity in the charges

6. *See* MARTHA C. NUSSBAUM, DISGUST, SHAME, AND THE LAW 21–2 (2004).
7. *Id.* at 22.
8. Nussbaum, *supra* note 6, at 23 (emphasis added).
9. *Id.* at 31.
10. *Id.* at 34.
11. *Id.* at 32–33.
12. SENECA, ON ANGER 17 [Book I], *in* SENECA: MORAL AND POLITICAL ESSAYS (John M. Cooper & J.F. Procopé, eds. 1995) (hereinafter "ANGER"); *see also* FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALITY 21–22, 40, 48–50 (Keith Ansell-Pearson ed. 2007) (discussing anger, similarly, as an impulsive reaction, but noting that law developed on a presumption that "the criminal deserves to be punished *because* he could have acted

brought before the "law-courts" of his contemporary Rome, as well as in the warfare throughout his known world.[13] He also, like Greeks before him, articulated its cause as a desire for retribution, "damaging" a person who has wronged the angered individual.[14]

In the intervening millennia since Seneca—and, notably, in the post-September 11, 2001, American milieu, or in the aftermath of the 2008 and 2016 elections of Presidents Barack Obama and Donald Trump—anger as an emotion with a critical political valence has come back into sharpened focus in humanities and social science research.[15] Some, like John Ehrenreich in his recent book, *Third Wave Capitalism*, link anger (with anxiety and rage) to overarching structural problems in government and the economy in capitalist, industrialized societies like the U.S., opening the door to systemic and structural discussions of great value here.[16] Researchers in philosophy, politics, and psychology have not reached a consensus on which emotions could underlie political systems' outcomes, whether in the case of individual election results or in terms of the theorized, oft-studied polarization of American elites and voters.[17] All the while, anger has been a recurrent subject of focus for intuitive reasons – as a powerful emotion intertwined with individual, group, and systemic

otherwise," which Nietzsche laconically calls "a piece of [moral] perfection … difficult to *believe*") (emphases in original) (hereinafter "GENEALOGY").

13. *Id.* at 18–19.

14. Seneca, *supra* note 12, at 20.

15. *See generally* Antoine J. Banks, *The Public's Anger: White Racial Attitudes and Opinions Toward Health Care Reform*, 36 POL. BEHAVIOR 493 (2014) (on the intersections of race and emotions/affect amid health care reform debates of President Obama's first term); Sue Campbell, *Being Dismissed: The Politics of Emotional Expression*, 9 HYPATIA 46 (1994) (discussing, *inter alia*, how emotion terms characterize and dismiss women in political and public forums); Todd H. Hall & Andrew A.G. Ross, *Affective Politics after 9/11*, 69 INT'L ORG. 847 (2015) (extending emotional/affective politics research analyses to significant individual actors in post-9/11 international relations contexts); Lilliana Mason, *"I Disrespectfully Agree": The Differential Effects of Partisan Sorting on Social and Issue Polarization*, 59 AM. J. POL. SCI. 128 (2015) (relating research on emotions and emotional intensity to separate dimensions of political polarization in contemporary America); Patrick R. Miller, *The Emotional Citizen: Emotion as a Function of Political Sophistication*, 32 POL. PSY. 575, 579–81 (2011) (finding, *inter alia*, a link between emotional intensity and political sophistication, and hence advancing Nussbaum's view of emotion—including anger—as a cognitive process, while noting sophisticated political observers tend to better link their anger to relevant policies addressing their concerns); *accord* Shana Kushner Gadarian & Bethany Albertson, *Anxiety, Immigration, and the Search for Information*, 35 POL. PSY. 133 (2014) (finding anxiety is linked to paying closer attention to news information, echoing Miller's emotionality-sophistication findings).

16. JOHN EHRENREICH, THIRD WAVE CAPITALISM: HOW MONEY, POWER, AND THE PURSUIT OF SELF-INTEREST HAVE IMPERILED THE AMERICAN DREAM 154–72 (2016).

17. *See, e.g.*, Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411 (2014) (finding, inter alia, the U.S. electorate of the early 2010s had become more sharply polarized than at any time since the Civil War).

political action and reaction, and thus of great importance to the legal institutions which adjudicate many of society's conflicts.

At least in Nussbaum's view, anger (like grief) has complex overlaps with adjacent feelings and the broader affect of a given individual.[18] One key emotion often linked to anger is *ressentiment*. The term owes its popularization in significant part to the thought experiment in Friedrich Nietzsche's *On the Genealogy of Morality*, where those who suffer indignities without any "proper response of action" (on account of their lower "moral" status) eventually will reach a kind of steady state of enduring, repressed disturbance.[19] A generation later, Max Scheler described *ressentiment* somewhat more broadly as a "self-poisoning of the mind…a lasting mental attitude, caused by the systematic repression of certain emotions and affects," e.g., "revenge, hatred, malice, envy, the impulse to detract, and spite."[20] Scheler's development of *ressentiment* recast it as a progressive mental state: it starts with repressed desires for retribution among "those who are 'weak' in some respect" (e.g., in social standing); over time, however, it becomes more than a mere emotion, eventually detaching from "definite objects" (like specific persons) and becoming directed more toward "the sting of authority" itself.[21] *Ressentiment*, while related, is not coterminous with resentment, and should be understood as a dynamic emotional state with long time horizons, including both sustained periods and discrete flashes of anger as possibilities. These three mental states—anger, resentment, *ressentiment*—are linked, often working in tandem, but should be viewed as conceptually distinct.

Despite the concerns of Seneca and his fellow Stoics about its potential for evil, *anger* in many legal contexts falls narrowly within Nussbaum's cognitivist framing.[22] One area where anger plays a substantial role but has been poorly conceptualized is in speech-related claims. Adapting Seneca's understanding of anger as a retribution-seeking emotion flowing from another's provocation to "retaliation," the First Amendment's "fighting words" doctrine set forth in *Chaplinsky v. New Hampshire* has persisted for over 70 years.[23] Part III, below, elaborates on the logic of *Chaplinsky* and

18. *See generally* THINKING ABOUT FEELING, *supra* note 2 at 271–74.

19. GENEALOGY, *supra* note 12 at 20 (describing the "slave revolt").

20. MAX SCHELER, RESSENTIMENT 4 (1915) (Louis A. Coser trans. 2015) (hereinafter "RESSENTIMENT").

21. *Id.* at 5–6.

22. For a discussion of voluntary manslaughter charges—in which a defendant's murder charge may be reduced if the act of killing is proven to be "in response to [an 'adequate,' 'reasonable'] provocation" and "without sufficient cooling time," among other requirements—*see* MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 37–8 (2004).

23. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942); *see also* Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L.

provides an overview of developments in free speech jurisprudence since it was decided, taking up the question of whether and, if so, to what extent—American law properly captures the dynamics of anger and related emotions. Part III then turns to *Brandenburg v. Ohio* and the "incitement" doctrine articulated thereunder,[24] explaining how the same foundational, cognitivist understanding of anger underlying both decisions elides anger's many individual and contextual variations, despite different implications across the two doctrines.

III. FREE SPEECH AND FURY: THE FIRST AMENDMENT, INSULT, AND ANGER

A. Generalized, Stepwise Approaches to First Amendment Free Speech Analysis

Expansive free speech protections emerged relatively recently, coming through a series of First Amendment cases between 1919 and the early 1940s.[25] Initially, "social and religious activists" comprised some of the most famous litigants, among them "abolitionists, the anarchists, the Industrial Workers of the World, the Socialist party, and the early labor and women's movements," all of whom increasingly pressured state and federal courts to recognize their repression as inimical to democratic values.[26] Contemporary understandings of free speech doctrine first appeared only in various dissents from this era; in 1939's *Hague v. CIO*, the Supreme Court finally articulated the classic view of public spaces like sidewalks and public parks as places "immemorially … held in trust for the use of the public," including free speech, assembly, and other core First Amendment Rights.[27]

This transformation was neither total nor inexorable through the 1950s and 1960s. The U.S. Supreme Court maintained a variety of restrictive doctrinal tests, like the "clear and present danger" test (where speech could be proscribed if it presented a "clear and present danger" of inciting

REV. 799, 815 (2010) (discussing how various "First Amendment doctrines rely on a model of the audience as rational, skeptical, and capable of sorting through masses of information to find truth," but that exceptions, like *Chaplinsky* or the "incitement" of audiences under *Brandenburg v. Ohio*, remain relatively "rare" outliers); *accord* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

24. 395 U.S. 444 (1969) (per curiam). *Brandenburg*'s established and extant doctrine is known by several terms, including (as here) reference to "incitement" or to its "imminent lawless action" (or "imminence") test. These phrases are used interchangeably throughout this essay.

25. *See generally* David Kairys, *Freedom of Speech* 190, 191, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys, 3d ed. 1998).

26. Kairys, *supra* note 25, at 193.

27. *Id.* (*citing* Hague v. CIO, 307 U.S. 515 (1939)); *accord* Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

unlawful conduct), established in the 1919 case *Schenck v. United States*.[28] Although *Schenck* ostensibly overruled the earlier "bad tendency" test under *Patterson v. Colorado*, from a decade earlier, the same "bad tendency" test was used during the term immediately following *Schenck*, leaving a consistent understanding of free speech and its limits in flux.[29] But by the 1960s and 1970s, the "liberal paradigm" of modern First Amendment jurisprudence had largely established its continuing, canonical two-step analytical framework for free speech challenges.[30] Under the liberal paradigm, speech first is "categorized as either protected or unprotected based on its subject matter," with content-based (or viewpoint-based) regulations of speech assessed as presumptively unconstitutional.[31] If the regulated speech in question is found to be protected, such speech generally cannot be curtailed *unless* the state can prove that their action restricting it "is furthering a compelling interest than cannot be furthered" by less-restrictive means.[32] Unprotected speech, meanwhile, can include forms of speech relevant for present purposes, including "incitement to imminent lawless action" and "fighting words."[33] Other doctrines address idiosyncrasies across a range of speech contexts from commercial speech to prior restraints on press publications,[34] or permit reasonable "time, place, manner" ("TPM") restrictions on the manner in which speech can occur in public venues,[35] but the same basic framework governs all free speech claims of present concern.

B. *Chaplinsky v. New Hampshire*, Its Progeny, and Free Speech Jurisprudence of Anger

In *Chaplinsky*, a member of the Jehovah's Witnesses appealed his conviction under New Hampshire's Public Laws, which forbade individuals from, *inter alia*, addressing "any offensive, derisive or annoying word to any other person" in public spaces.[36] Chaplinsky admitted to "distributing the literature of his sect," which triggered public

28. Kairys, *supra* note 25 at 196; *accord* Schenck v. United States, 249 U.S. 47 (1919).

29. *See* Patterson v. Colorado, 205 U.S. 454 (1907); Abrams v. United States, 250 U.S. 616 (1919) (applying the "bad tendency" test in upholding the conviction of a leaflet distributor).

30. Kairys, *supra* note 25, at 197.

31. Kairys, *supra* note 25, at 197.

32. This, in other words, is the quintessential "strict scrutiny" standard. *Id.*

33. *Id.*

34. *Id.* at 197–99.

35. *Id.* at 197; for an illustration of overlaps between TPM and implicitly content-specific speech restrictions, *see* McCullen v. Coakley, 573 U.S. 493 (2014) (unanimously holding a Massachusetts "buffer zone" law prohibiting protest of abortion clinics unconstitutional on grounds that it was insufficiently narrowly tailored and thus infringed free speech).

36. *Chaplinsky*, 315 U.S. at 569.

complaints and eventual intervention by the City Marshal.[37] The Marshal "warned Chaplinsky that the crowd was getting restless," but, after persisting, a traffic officer apprehended Chaplinsky later the same day.[38] When the Marshal encountered Chaplinsky and the traffic officer en route to the station, Chaplinsky allegedly uttered the words which made the case famous, calling the Marshal a "damned fascist."[39]

Proceeding to the New Hampshire Supreme Court, and eventually appealing to the U.S. Supreme Court, Chaplinsky lost his case every step of the way.[40] In upholding Chaplinsky's conviction, the U.S. Supreme Court put forth its canonical articulation for permitting state actors to restrain "fighting words," which merits quotation in full:

Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or *"fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace*. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[41]

The U.S. Supreme Court insisted later in the opinion it was bound to defer to New Hampshire interpretations of state law,[42] but the "fighting words" doctrine it propounded as a matter of constitutional law was its own creation. The attendant *Chaplinsky* test, like other legal tests referenced above,[43] applies a reasonableness standard, i.e., what "would be … likely to cause an average addressee to fight," in establishing whether a censorious state action is constitutional.[44]

Chaplinsky quickly proved controversial, producing as it did a seemingly nebulous principle in free speech jurisprudence. By the early 1950s, subsequent free speech cases began to curtail *Chaplinsky*'s reach,[45]

37. *Id.* at 569–70.

38. *Id.* at 570.

39. *Chaplinsky*, 315 U.S. at 569. The exact phrasing has been given as a "damned fascist" or alternately a "goddamned fascist" in various apocrypha to the case.

40. *Id.* at 568–69.

41. *Id.* at 571–72 (emphasis added).

42. *Id.* at 572.

43. *See* notes 6–7, *supra*, and accompanying discussion.

44. *Chaplinsky*, 315 U.S. at 573.

45. *See, e.g.*, Beauharnais v. Illinois, 343 U.S. 250 (1952) (restricting *Chaplinsky*, holding that words constituting "part of arguments on questions of wide public interest and freedom" cannot be "fighting words" within *Chaplinsky*'s meaning).

even as the scope of free speech rights overall remained less capacious than they are today. Still, the Supreme Court's midcentury cases established broad outlines for constitutional regulations of speech that remain, as in cases of "fighting words" described above. Altogether, from *Chaplinsky* through signal cases in the late 1960s, the range of speech the government may proscribe *ex ante* (through prior restraints) or may halt while underway grew modestly to include speech that is likely to incite violence; lies; the lewd and profane; and speech which falls into other categories of marginal speech[46] with low or entirely lacking "value" to merit state protection.[47]

In the last seven decades, all these varieties of less-protected or wholly unprotected speech—and the *Chaplinsky* rule on "fighting words" notably—have been repeatedly challenged. *Chaplinsky*'s original rule, unlike many others, has been narrowed with great regularity; after *R.A.V. v. City of St. Paul*, the "fighting words" doctrine's status has been described variously as "confusion"[48] or as being "quarantined,"[49] if still short of functionally dead. In *R.A.V.*, the Court unanimously declared a St. Paul, Minnesota ordinance unconstitutional on grounds that it was an impermissible content-based regulation of speech and reversed the attendant conviction of a teenager for burning a cross on the property of a Black family in the city.[50] The ordinance at issue in *R.A.V.* expressly was written with the "fighting words" doctrine in mind, but as the Supreme Court's majority declared the law unconstitutional on its face, the Court thus failed to reach the question of permissible post-*Chaplinsky* grounds for proscribing incendiary individual speech.[51] In short, the content specificity of the St. Paul law, constituting a *content*-based regulation, obviated any need for analyzing questions about the earlier precedent.[52] Adding further confusion, a decade after *R.A.V.*, the Supreme Court

46. *See* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1 (1984).

47. Among the "values" of free speech guarded by the First Amendment are those of democratic deliberation; the search for and elevation of truth; and ensuring maximal liberty vis-à-vis pluralistic society. *See* David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct,* 29 HARV. C.R.-C.L. L. REV. 326 (1994); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990) (on democratic deliberation and the search for truth functions). For a broad overview of limited situations in which content-based regulation of speech is permissible and the underlying logic, see Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

48. Melody C. Hurdle, *R.A.V. v. City of St. Paul: The Continuing Confusion of the Fighting Words Doctrine*, 47 VAND. L. REV. 1143 (1994) 1148.

49. Burton Caine, *The Trouble with Fighting Words: Chaplinsky v. New Hampshire Is a Threat to First Amendment Values and Should Be Overruled*, 88 MARQ. L. REV. 441, 547 (2004).

50. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

51. *Id.* at 381.

52. *Id.* at 382–83.

distinguished protected expressive conduct from unprotected targeted intimidation in *Virginia v. Black*.[53] In *Black*, the Court struck down in part a Virginia statute that defined cross-burning as prima facie evidence of an intent to discriminate, but upheld the conviction of a Virginia Beach man for his specific act of burning a cross on a family's lawn as an instance of targeted intimidation, i.e., an unprotected "true threat."[54] As will be examined in greater detail below,[55] the very boundaries between these categories of speech are not entirely clear; reading *R.A.V.* and *Virginia v. Black* in tandem highlights some of the difficulty in distinguishing among fully protected political expressions (including baldly racist viewpoints) and specifically targeted "true threats."

C. Beyond Individual Engagement: *Brandenburg*, "Incitement" and "Imminent Lawless Action," and First Amendment Doctrines for Group-Related Speech

In some of the signal cases surveyed above, the cognitivist view of emotional processes and of anger are apparent: "fighting words" are a rare, and generally sidelined, exception to free speech protections in part because they are expected to be so provocative to the listener in a flash of anger. In those contexts, "fighting words" are valueless speech under the First Amendment because reasonable listeners, angered by the insulting utterance, *should be expected to react*. Otherwise, free speech jurisprudence expects some greater measure of restraint. Yet a core problem with this framework is how narrowly irrepressible anger was construed, as well as the absence of any consideration of how individual positionalities, of speakers *or* listeners, may affect real-world interactions. Leading American jurists' understanding of anger, like Nussbaum's, also remains limited by the contexts in which they work best: one-on-one interactions between speakers (or a speaker and a listener) engaging in real-time where an egregious insult is lobbed from one to the other.

Anger's complexities demand deeper interrogation. After all, one-to-one, real-time interactions are not always the basis for violent or otherwise unlawful conduct in response to contentious speech. Across the various scenarios of in-person listeners' reactions (e.g., including *Chaplinsky*), free speech jurisprudence separates spoken expressions from "actions" as distinct concepts. A person's *actions* are fair game for regulation and restriction under the constitution, but their expressions—and especially the specific content or viewpoint they express[56] – typically are not.

53. 538 U.S. 343 (2003).

54. *Id.*; *accord* Watts v. United States, 394 U.S. 705 (1969) (first articulating the "true threats" doctrine).

55. *See infra*, Part IV.

56. *See* notes 26–35, 51–54, *supra* and accompanying discussion.

Yet, in the concept of "incitement" under *Brandenburg v. Ohio*,[57] similar reasoning processes yielded even graver contradictions. While demonstrating a somewhat more-sophisticated understanding of duration and timing issues relating to anger after the earlier "fighting words" cases, the U.S. Supreme Court in *Brandenburg* ruled that Ohio's criminal syndicalism law prohibiting certain speech which called for illegal action violated free speech rights, establishing an "imminence" requirement for halting or barring a speaker based on the *content* of their speech.[58] More formally, the Court articulated a two-pronged test for lawfully prohibiting "inciting" speech: the speaker's words must (1) be "directed at inciting or producing imminent lawless action" *and* (2) be "likely to incite or produce such action."[59] "Mere advocacy" or "teaching" of illegality, in other words, cannot be prohibited by the state; a speaker must actually seek and be likely to achieve whatever unlawful conduct.

In the five decades since *Brandenburg* was decided, the foregoing test has remained intact and virtually unchanged.[60] More recently, *Brandenburg* became a subject of academic interest in the wake of the September 11, 2001, terror attacks[61] and—of even greater interest here—became a recurring focus amid today's prevalent, online-based forms of speech.[62] Regarding the former, *Brandenburg* has been at the periphery of various cases concerning free speech and other civil liberties in the "post-9/11 world," including those "upholding measures taken in connection with airport security, subway searches, restrictions on political speech at political conventions, and immigration decisions."[63] Most prominently, whereas *Brandenburg* imposes imminence and likelihood requirements in restricting speakers who may incite others, *Holder v. Humanitarian Law Project* upheld the Antiterrorism and Effective Death Penalty Act ("AEDPA"), effectively ruling that nonprofit organizations could be barred from instructing foreign terrorist groups about international humanitarian

57. Brandenburg v. Ohio, 395 U.S. 444 (1969).

58. *Brandenburg,* 395 U.S. 444.

59. *Id.* at 447. This test became known as the "imminence" test or the "clear and present danger" test; again the terms are used interchangeably throughout this essay, though the latter is more commonly used in the literature; *accord* David R. Dow & R. Scott Shieldes, *Rethinking the Clear and Present Danger Test*, 73 IND. L.J. 1217, 1233 (1998).

60. *See* Hess v. Indiana, 414 U.S. 105 (1973) (per curiam) (affirming *Brandenburg* and clarifying the imminence requirement necessarily excludes censuring future lawless action); *see also* Part IV, *infra* for discussion.

61. *See, e.g.*, Avidan Y. Cover, *Presumed Innocence: Judicial Risk Assessment in the Post-9/11 World*, 35 CARDOZO L. REV. 1415 (2014).

62. *See* Daniel T. Kobil, *Advocacy on Line*: Brandenburg v. Ohio *and Speech in the Internet Era*, 31 U. TOL. L. REV. 227 (2000).

63. Cover, *supra* note 61, at 1430–31.

law encompassed within AEDPA's meaning of providing "material support" for terrorists.[64]

Another modern phenomenon, one which complicates the decades-old *Brandenburg* standard and the disjointed *Chaplinsky* framework, has been under-theorized despite its growing prominence: stochastic violence. Stochastic violence itself generalizes the earlier phrase "stochastic terrorism," most-frequently used in journalistic contexts, which denotes a speaker's "use of mass communications," e.g., online outlets and social networks, to inspire *others* to perpetrate violence.[65] Neither the *Brandenburg* test nor its derivative elaborations in *Hess v. Indiana* had contemplated this distinct speech-violence dynamic, notwithstanding stochastic violence conceptually underlying judicial analyses in several high-profile cases.[66]

Brandenburg and the "incitement" doctrine it formalized rest on an understanding of anger that is facially consistent with *Chaplinksy*—i.e., anger as a sudden, sharp emotion that stultifies, if not overrides, reason. But where these cases diverge appears telling. In *Chaplinsky*, the sharp anger of listeners in response to what was deemed a galling insult led the Court

64. *Id.* at 1431–35; Holder v. Humanitarian Law Project, 561 U.S. 1 (2010). *See also* The Antiterrorism and Effective Death Penalty Act of 1996*,* Pub. L. No. 104-132, 110 Stat. 1214, § 303.)

65. *See, e.g.*, G2geek, *Stochastic Terrorism: Triggering the Shooters*, DAILY KOS (Jan. 10, 2011), https://www.dailykos.com/stories/2011/1/10/934890/- [https://perma.cc/6ERK-QQ8V].

66. *See, e.g.*, Andy Campbell, *2 Proud Boys Sentenced to 4 Years in Prison over Gang Assault in New York*, HUFFPOST (Oct. 22, 2019), https://www.huffpost.com/entry/proud-boys-sentenced-new-york_n_5daf2841e4b0f34e3a7d652c [https://perma.cc/6XPP-ZV7Z] (discussing the cases of two far-right Proud Boys gang members—Maxwell Hare and John Kinsman—were sentenced to four years in prison each, along with "another five years of supervised release"; during their sentencing, the Manhattan judge, Mark Dwyer, connected them to Proud Boys leader Gavin McInnes, a co-founder of VICE Media and virulent racist "who has repeatedly tried to distance himself" from the organization). *See also* Sarah Mervosh, *F.B.I. Arrests U.S. Soldier Who Discussed Bomb Plot, Authorities Say*, N.Y. TIMES (Sept. 23, 2019), https://www.nytimes.com/2019/09/23/us/us-army-soldier-arrested-Jarrett-William-Smith.html [https://perma.cc/3NTZ-R9KW] (reporting on the arrest of active-duty soldier Jarrett William Smith, suspected of plotting to bomb "a major news network" and threatening then-Democratic Primary candidate Beto O'Rourke's assassination); *Suspected Neo-Nazi Charged with Gun Crime*, U.S. DEP'T OF JUSTICE (Nov. 14, 2019), https://www.justice.gov/usao-ndtx/pr/suspected-neo-nazi-charged-gun-crime [https://perma.cc/X3BY-QU5A] (disclosing and discussing the arrest of Aiden Bruce-Umbaugh, who 'was charged with [unlawful] possession of a firearm" after being "arrested in Post, Texas, dressed in tactical gear and in possession of multiple assault rifles" and "at least 1,500 rounds of ammunition"); Jason Wilson, *Far Right Network Orchestrated Synagogue Attacks, FBI Says*, GUARDIAN (Nov. 16, 2019), https://www.theguardian.com/world/2019/nov/16/far-right-network-orchestrated-synagogue-attacks-fbi-says [https://perma.cc/M7WC-EAMQ] (reporting how Richard Tobin, of Nazi group The Base, directed and coordinated multiple acts of vandalism against synagogues in the Midwest, including defacing buildings "with fascist and [anti-Semitic] propaganda").

to categorize the speaker's utterances as valueless and unprotected; in *Brandenburg*, a case whose plaintiff was a rallying member of the Ku Klux Klan, listeners' outraged responses dropped from the analysis altogether, since Brandenburg himself was speaking only of his ideology, not imminent intent to act. Granted, the Ohio criminal syndicalism law was fatally flawed inasmuch as it was "overly broad" anyway, encompassing far more than the Klan in its overreach.[67] Nonetheless, the *Brandenburg* framework subtly removed emotional (i.e., intensely angry) reactions to a specific form of speech (i.e., racist speech) from inclusion among those instances where the cognitivist model contemplates impulsive reactivity. Regardless of the Court's intent, no discernible principle for this classification decision is apparent.

These cases significantly diverge in two further senses. First, *Chaplinsky* is not a particularly robust precedent in the present century; it has been described in recent years as a "quarantined"[68] doctrine, its crucial "injury" prong "deemed no longer operative,"[69] and some of its (few) more-recent favorable citations in federal court opinions have been doctrinally muddled at best.[70] The same cannot be said for *Brandenburg*, which remains actively litigated and an active force in First Amendment scholarship. Second, *Brandenburg*'s extant doctrine governing "incitement" adds some valuable nuance to the idea of anger under the First Amendment—it still presumes anger can override reason, but it acknowledges that direct insults are not the only way for speakers to trigger anger, and thus action, among listeners. Instead, *Brandenburg* contemplates *agreeing* listeners acting on the speaker's words encouraging the former to engage in "imminent lawless action." Although this nuance is a welcome corrective to *Chaplinsky*'s oversimplified framework, *Brandenburg* poses other challenges for contemporary CLS theorists and practitioners, several of which merit detailed discussion.

67. Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (articulating a "line between ideas and overt acts" as demarcating what is and is not subject to permissible government regulation).

68. Caine, *supra* note 49 (concluding, *inter alia*, that it would be a mistake "to conclude that there is no danger to freedom of speech on the theory that *Chaplinsky* has been quarantined and the fighting words doctrine rendered lame" because "the virus remains viable").

69. Dan T. Coenen, *Freedom of Speech and the Criminal Law*, 97 B.U. L. REV. 1533, 1548 (2017).

70. JoAnne Sweeny, *Incitement in the Era of Trump and Charlottesville*, 47 CAP. U. L. REV. 585, 620 (2019) (citing United States v. White, 698 F.3d 1005, 1016 (7th Cir. 2012), which used the *Chaplinsky* framework to decide a "purely verbal criminal solicitation case").

IV. DISCUSSION AND IMPLICATIONS: THE GENDERED AND RACIALIZED NARROWNESS OF ANGER UNDER THE LAW

A. The Narrowness of "Anger" in First Amendment Law: "Fighting Words" for Whom?

> First Amendment law has generally been leery of government attempts to change the marketplace of emotions – except when it has not been. Scientific evidence indicates that emotion and rationality are not opposed, as the law often presumes, but rather inextricably linked. There is no judgment, whether moral or otherwise, without emotions to guide our choices. Judicial failure to grapple with this reality has produced … puzzles in the law.
>
> -Rebecca Tushnet[71]

The precision and accuracy of the "fighting words" doctrine may be challenged on at least three grounds. First, it oversimplifies the emotion at the individual level, drowning out variation in anger's experience and expression through its slippery "reasonable person" standard, failing to account for how social forces affect certain individuals—notably women, non-whites, and other members of historically marginalized communities—and thus limit their expressions of emotion. Second, this area of jurisprudence overly relies on an individual-rationalist perspective, problematically excluding group dynamics while setting up discordant approaches vis-à-vis other free speech doctrines, like those on incitement and the speech-violence nexus more generally. Finally, and extending both of these concerns, online speech combines the preceding two problems with the conundrum of physical distance. Some speech may provoke and cross the *Chaplinsky*-defined threshold for "fighting words," inciting a similar rage, but online "listeners," lacking immediate, in-person recourse for releasing their anger, then lash out in a manner more attenuated than the Court in *Chaplinsky* (or *Brandenburg*, for the matter) contemplated. Of these concerns, the limited conceptualization of anger—its gendered and racialized elements—is crucial, the primary focus below.

71. Rebecca Tushnet, *More than a Feeling: Emotion and the First Amendment*, 127 HARV. L. REV. 2392 (2014). *Cf.* Lauren Berlant, *The Epistemology of State Emotion*, *in* DISSENT IN DANGEROUS TIMES 47, 47 (Austin Sarat ed., 2005) (reifying the rationality/emotion dichotomy and arguing that "political rationality as the core practice of [American] democracy" is being supplanted by "a scene for the orchestration of *public feelings* … of politics as a scene of emotional contestation," including a particular post-9/11 public *anger*).

B. Unpacking the Individual Characteristics of Listeners: The Pernicious Presumptions Underlying Free Speech Exceptions

Like Seneca and Nussbaum, America's founding-era constitutional debates—including the eventual First Amendment—treated emotions as both deeply political and yet rationally manageable, with a particular focus on ameliorating impulses to act on anger.[72] Over the intervening centuries, abovementioned First Amendment cases reified this perspective through the evolving "fighting words" and "incitement" doctrines. With *Chaplinsky* as the signal case in the former area, however, the Supreme Court's approach to conceptualizing anger suffers several shortcomings.

Chaplinsky involved face-to-face, real-time actors and conceives of anger as a snap response to a direct insult. This is an overly limited view; anger can take on many temporal forms beyond the near-instantaneous, reactive cases as in *Chaplinsky*, and it is affected by situational contexts (venue and social setting, for instance) and individual experiences (gender, race, class). Absent these considerations, the First Amendment's "fighting words" doctrine, among others, may mischaracterize anger perniciously.

72. As Alexander Hamilton wrote in the first entry of what would become *The Federalist Papers*, "[W]e are not always sure that those who advocate the truth are influenced by purer principles than their antagonists … To judge from the conduct of the opposite parties, we shall be led to conclude that they will mutually hope to evince the justness of their opinions, and to increase the number of their converts by the loudness of their declamations and by the bitterness of their invectives." Alexander Hamilton, *The Federalist No. 1*, *in* THE FEDERALIST PAPERS, 7, 8 (Ian Shapiro, ed. 2009). Here, while Hamilton raises the perpetual concern among the Framers regarding the "passions" of individuals and groups, he also advances a view of American democracy as a deliberative, rationalist one—*i.e.*, one where (more or less careful) reasoning may at least temper emotional reactions to political events and undergird a representative political system. For a general discussion of deliberative democratic theory (and its limits), see Magdalena Bexell, Jonas Tallberg, & Anders Uhlin, *Democracy in Global Governance: The Promises and Pitfalls of Transnational Actors*, 16 GLOB. GOV. 81, 84 (2010) (defining the deliberative democratic model as a system which "emphasizes deliberation among citizens [and] their representatives" inasmuch as informed opinions are shared, tested, and revised collectively and continuously); AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT (1996); AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY (2004); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996); Shawn W. Rosenberg, *Rethinking Democratic Deliberation: The Limits and Potential of Citizen Participation*, 39 POLITY 335, 336 (2007); IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 49 (2006). *Cf.* Lynn M. Sanders, *Against Deliberation*, 25 POL. THEORY 347, 348 (1997) (critiquing deliberative democracy and its advocates on grounds that evidence for "substantive or empirical" support among "ordinary citizens" for a more-deliberative system is lacking).

1. Social Differences in Allowable Anger: Gender

As constitutional law scholars have observed, language throughout the *Chaplinsky* opinion constrains anger to a gendered, i.e., male perspective.[73] *Chaplinsky*, in that sense, is a "hypermasculine" exemption from presumed "gentlemanly" expectations of conduct among men.[74] Indeed, other stereotypically "masculine" qualities abound in free speech doctrines and marquee cases from the last century,[75] effectively calibrating the Court's analysis in First Amendment cases toward a masculine view or ideal as a default. That this is true for the Court's general understanding of anger—and concomitant evasion of the social contexts and norms constraining or liberating individuals' expressions of it—poses one of the central problems of concern here.

As journalist Rebecca Traister explained in her recent book, *Good and Mad*, American women face categorically separate norms of conduct and expectations in expressing their anger, one where women's repressed anger builds over time after being targeted by pervasive sexual misconduct or being "ignored, sidelined, and not taken seriously," yet conventions militate against acting in any manner that appears "belligerent" or confrontational.[76] From the introduction, Traister juxtaposes her approach to anger with Nussbaum's earlier *Anger and Forgiveness*.[77] For Traister, anger is not an "inherently vengeful impulse, and … therefore punitive and counterproductive" as Nussbaum asserts; rather, anger can arise from "objection to injustice" and "inequity" in society broadly or, in an "optimistic" sense too often ignored, as "a communicative tool, a call to action."[78] While pointing out how experiences and expressions of anger among women may deviate from Nussbaum and American jurists' understanding, Traister thus also poses a keen challenge to Seneca's elemental assumption: that anger itself is a necessarily "bad" or damaging emotion in some way.

73. *See* John M. Kang, *Manliness and the Constitution*, 32 HARV. J.L. & PUB. POL'Y 261, 263 (2009) ("the fighting words doctrine targets men and draws from a gendered worldview … and, although women theoretically can also retaliate with violence against men or women, [the] Court never refers to the female perspective. For the Court, only men threaten the public peace with their anger and, thus, only men must not be needlessly aggravated"). *See* Chaplinsky v. N.H., 315 U.S. 568, 573 (1942).

74. *See* Kang, *supra* note 73, at 263.

75. *Id.* at 265 (*citing* Whitney v. Cal., 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969)) (propounding a "discourse about male identity" and the vital need for men to have "courage" in vindicating their constitutional rights).

76. REBECCA TRAISTER, GOOD AND MAD: THE REVOLUTIONARY POWER OF WOMEN'S ANGER xvi–xvii (2018).

77. MARTHA NUSSBAUM, ANGER AND FORGIVENESS: RESENTMENT, GENEROSITY, JUSTICE (2016).

78. TRAISTER, *supra* note 76, at xxvi–xxvii.

In short, Traister's book makes the case that American women's outwardly expressed rage is experiencing a "contemporary reemergence … as a mass impulse" during the Trump era.[79] Throughout, women's public anger is shown as bipartisan,[80] long-simmering,[81] and increasingly undisguised, occasionally acidly profane.[82] While norms may be shifting (among some) and more American women are claiming a broader range of outward angry expression, especially among younger Americans.[83] Traister underlines throughout her writing that shifts are *not* complete transformations. Even three-plus years after the 2016 election, "rage is an emotion that is permitted and encouraged in (some) men," but remains "forbidden, invalidated, and treated as a path to self-defeat" for many women by dominant figures in society.[84] *Good and Mad*, after all, catalogues the anger and actions of some of America's most-powerful women in media, entertainment, academia, and politics; they all face double standards and regressive gendered tropes with regularity, suggesting those in lower socioeconomic strata face even greater social and normative impediments to expressing themselves.

79. *Id.* at 2.

80. For example, Traister cites Tea Party-linked women, both leaders and supporters, angrily engaging in a traditionalist blowback against the Obama administration—part of a lose bloc of traditionalist women dating at least to Phyllis Schlafly's "antifeminist crusades of the 1970s and 80s." *Id.* at 6–7.

81. *Id.* at 9 ("[I]n the years leading up to the 2016 election, there was a building public rage" among women and a greater willingness "to broadcast … powerful, desperately felt anger" in public).

82. In one brief passage, Traister notes the cases of two women elected to high-profile public offices: San Juan, Puerto Rico Mayor Carmen Yulín Cruz ("'I don't give a shit,' Cruz told reporters when asked about the president's criticism") and U.S. Senator Kirsten Gillibrand (D-NY) ("Gillibrand, too, stopped being polite, telling [Traister] during a spring 2017 interview that officials are in Washington 'to help people, and if we're not helping people we should go the fuck home'"). *Id.* at 36.

83. A captivating example highlighted by Traister is the "incandescently furious" Emma González, one of the student leaders pushing for nationwide gun control reforms following the 2018 mass shooting at Marjorie Stoneman Douglas High School in Parkland, Florida, where 17 students were killed and more than a dozen more were injured. *Id.* at 42. *Accord* Chelsea Bailey, *At Rally, Parkland Shooting Survivors Rail Against Gun Laws, NRA and Trump*, NBC NEWS (Feb. 17, 2018), https://www.nbcnews.com/news/us-news/rally-parkland-shooting-survivors-rail-against-gun-laws-nra-trump-n849076 [https://perma.cc/72TE-G6BF].

84. TRAISTER, *supra* note 76, at 61. Post-election examples cited include media censuring of late-night host Samantha Bee's profanity-laden monologues and comedian Michelle Wolf's "brutal" standup set at the 2018 White House Correspondents' Dinner, to-date the last such Dinner to have a headliner. *Id.* at 104–05; the at-best partial reckonings for high-profile men accused of horrific, sustained abuse of women, such as film producer Harvey Weinstein, talk show host Charlie Rose, and producer and standup comic Louis C.K. *Id.* at 136–46; and the sustained abuse of elected women who "had led the charge" in seeking U.S. Senator Al Franken's resignation following multiple reports of sexual misconduct. *Id.* at 163–65.

Generalizing these observations in legal contexts specifically, feminist legal theorist Frances Olsen has explained them as a corpus of tendencies toward gendered, hierarchical, and illusory "dualisms" in law.[85] Several of these erstwhile dualisms, "rational/irrational," "thought/feeling," "reason/emotion," underscore the preceding challenges to the First Amendment's conception of anger.[86] Yet, Olsen argues law should reject these false dichotomies altogether, not just recalibrate them, on both empirical and normative grounds.[87] As Olsen explains, the presence of such gendered dualisms in law "accept in general the proposition that men and women are different" without evidence and preclude considering their full complexities.[88] Rules designed with a narrow, stereotypically male perspective in mind, like the machismo, snap-reactive one evinced in *Chaplinsky*, are "too specific, definite, and contextualized to count as principles," because the social contexts of all other perspectives, including those of all non-men, can never fit into their paradigm.[89] Constitutional law leaves room for "minor exceptions and subdoctrines that permit some influence of the subjective, contextual, and personalized," but the limits placed on "subjective" or "personalized" considerations at the margins, combined with the a priori general orientation toward principle, rationality, and objectivity, only reaffirms biases favoring male-identified sides of the dualisms Olsen addresses.[90]

2. Social Differences in Allowable Anger: Race and Racism

Race and racism, whether witting or not, present additional challenges to the *Chaplinsky* model. For nonwhite Americans, racist stereotypes and diverging governmental and cultural norms about expressing public anger compound the complexities of expressing or repressing anger noted above. Moreover, the state's responses to different individuals and groups' public displays of anger—as in protest actions—vary on the basis of race. For example, the recent cases of mass protests in Ferguson (2014) and the Women's Marches (2017 onward) displayed enormous disparities: police responses to the majority-Black protesters in Ferguson were militarized and violent compared to the anodyne permissiveness of authorities toward the visibly white Women's March organizers and attendees.[91] In addition, race

85. Frances Olsen, *The Sex of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 691, 691–92 (David Kairys, 3d ed. 1998).

86. *Id.* at 691.

87. *See* Olsen, *supra* note 85.

88. *Id.* at 695.

89. Olsen, *supra* note 85, at 701.

90. *Id.* at 703.

91. *See* Abby Harrington, *Tanks and Rubber Bullets vs. Pussy Hats and High-Fives: A Comparative Look at the 2014 Ferguson Uprising and the 2017 Women's March on Washington*, 31 HASTINGS WOMEN'S L.J. 101 (2019). *Accord* Rod K. Brunson & Jody Miller, *Gender, Race, and Urban Policing: The Experience of African American Youths*, 20

and racism are not merely social phenomena, but instead are embedded in past and present state institutions and often undergird actions taken by state-linked actors. Those state-individual contexts include, among others, racist patterns of policing and incarceration, as well as profoundly asymmetric rates of arrest and prosecution.[92] These considerations form a daunting backdrop for nonwhite (and non-male) listeners, restraining their responses in ways not contemplated by the Court in *Chaplinsky* and later cases. Black and brown Americans have myriad deeply rooted claims for condemning state authorities, for angrily castigating them in terms far harsher than Chaplinsky's censured utterance, but they also face far greater chances of harm if they choose to do so. Censure limits free speech rights; speaking out against racist systems often deprives speakers of color their very lives.

Where race and sex intersect, like for Black women and other women of color, the social context becomes more complex, with overlapping dimensions of marginalization and norm-based censure. While the contributions of critical race theory (CRT) to legal scholarship writ large have been exemplary, constitutional law theorists and the federal courts alike still exhibit, as Kimberlé Crenshaw has put it, a "tendency to treat race and gender as mutually exclusive categories of experience and analysis."[93]

Crenshaw has explained that this tendency is "perpetuated by [the] single-axis framework" which dominates theory and practice, a framework perhaps best illustrated by antidiscrimination law cases where Black women must elect either race *or* sex/gender as grounds for their claims, but not both.[94] Such "compound claims," according to federal courts' reasoning across several cases, are not within the bounds of discrimination contemplated by Congress when it passed the Civil Rights Act of 1964; in effect, such cases have held, the "discrimination against Black women" cannot conceivably "exist independently from the experiences of white women or of Black men."[95] Even where white men expressly are *not* the implied or explicit presumed perspective under law, as with legislation and litigation concerning sex discrimination, there remains an "implicit grounding of white female experiences" that prevents Black (and other

GENDER & SOC'Y 531, 533–34 (2006); TRAISTER, *supra* note 76 at 8, 29–31. For a discussion of the background for local police departments' militarization from the 1990s to the present, seeKATHLEEN BELEW, BRING THE WAR HOME: THE WHITE POWER MOVEMENT AND PARAMILITARY AMERICA 188–91 (2018).

92. *See, e.g.*, ANGELA DAVIS, POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT 11–13, 17–21 (2017).

93. Kimberlé Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 356, 356 (David Kairys, 3d ed. 1998).

94. *Id.*

95. Crenshaw, *supra* note 93, at 357. *See also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et. seq. as amended (2009).

nonwhite) women from making specific legal claims—that their discrimination is because they are Black women (or they are Latina, or Indigenous women, and so on).[96] In such a way, the relegation of nonwhite perspectives beyond the default framework of free speech jurisprudence compounds the relegation of women's perspectives; Black and brown women, specifically, are doubly overlooked and unconsidered in these cases.

The confluence of a (white, male) exclusionary lexicon of emotions in First Amendment doctrine with the preceding realities of race-based or multidimensional marginalization should give theorists and practitioners pause. These issues are likely further compounded by *other* overlapping characteristics—from class and socioeconomic status to sexuality, religious affiliations, disability status, and more—which configure individuals' lived realities, including emotional expression or repression.[97] The cognitivist view undergirding First Amendment jurisprudence simply does not account for this multiplicity in speech settings and normative restrictions on *actual* individual expressions. The costs and perils facing angry listeners are not equally distributed—nor are individuals' attendant chances of being afforded grace after acting from a place of anger. These blindspots must be identified fully and brought into theoretical and practical discussions of First Amendment jurisprudence.

C. Law's Muddled Understandings of Anger's Duration and Relation with *Ressentiment* and Resentment

While the Court's understandings of anger, rage, and resentment at least are serviceably close to the traditional philosophical conceptions of Seneca and Martha Nussbaum, however limited, the legal field's comprehension of *ressentiment* is far less clear.

Per Traister, longevity and suppression are recurring themes in the recent history of women's rage—the prolonged duration of cumulative adverse experiences driving women's post-election rage, for instance, defy

96. Crenshaw, *supra* note 93, at 359. For nonwhite women, therefore, the intersections of race and sex mean discrimination can arise in one of three ways: "from sex discrimination or race discrimination *or both*." *Id.* at 361 (emphasis added). Sexuality, class, and other bases for discriminatory treatment may add further dimensions atop these, which are discussed briefly in Part III(B)(3), *infra*, although no comprehensive account of all potential dimensions is feasible in this limited space. For a broad overview of "intersectionality" in law and politics, *see also* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241 (1991); Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647 (1996). For a broad critique of single-axis frameworks and their erasure of Black women's particularly situated experiences, see BELL HOOKS, KILLING RAGE: ENDING RACISM (1995).

97. *See generally* Crenshaw, *supra* note 93. *See also* Lucy A. Williams, *Welfare and Legal Entitlements: The Social Roots of Poverty*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 569 (David Kairys, 3d ed. 1998).

the characterizations of Nussbaum or Supreme Court justices.[98] Still other scenarios clearly implicate the concepts of resentment and *ressentiment* in ways that blur the distinction between "advocacy" and action specifically found in *Brandenburg*. Contemporary followers of various American far-right movements, for example, recently were described as a precise class of "bigot," one who harbors a "fierce resentment of modernity's advocates and beneficiaries," combining both the envious idea of *ressentiment* in Nietzsche and Scheler,[99] but also on the vigorous resistance against "the forces of modernity," which the bigot fears.[100] A toxic mixture of fear, simmering resentments, and hatreds, when combined with a proximate trigger for anger amid less-constraining norms against expressing it, can prove combustible; repetitious "mere advocacy," especially in the fervid, insular online ecosystem of far-right communities, may readily prompt targeted actions by reactionary acolytes.[101]

Laws, like the Constitution itself, must achieve broad generality in their applications to individuals across varied experiences, positions, and time. But in making the "fighting words" doctrine, with an implicitly narrow, exclusionary conception of anger, the Supreme Court simply did not

98. *See supra* notes 79–83 and accompanying discussion. *See also* Part IV(B)(2), *supra* for discussion of the interactions between race and gender, as they similarly implicate resentment and *ressentiment*.

99. *See supra* Part II, *passim*.

100. Stephen Eric Bronner, *From Modernity to Bigotry*, *in* CRITICAL THEORY AND AUTHORITARIAN POPULISM 85, 89 (Jeremiah Morelock, ed. 2018).

101. *Id.* at 91–92. Even where *ressentiment has* been encompassed in academic works, many legal scholars addressing the concept do so through attenuated analysis—for instance, those who study the legal field's representation in literature, film, and other popular media, *see also*, Dan Markel, *Are Shaming Punishments Beautifully Retributive: Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2183 n. 133 (2001) ("[W]hen I use 'moralist' or 'moralizing' I am referring to the scolding sensibility of the schoolteacher, the kind of person who punishes, and enjoys punishing, as a result of what Nietzsche called 'ressentiment'); William H. Page, *The Place of Law and Literature*, 39 VAND. L. REV. 391, 404 (1996) (defining *ressentiment* as a "prolonged sense of injury based on real or imagined insult"). Or in legal philosophy, as well as some others working from within various critical legal studies traditions, *see also* Lolita Buckner Inniss, *A Domestic Right of Return: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina*, 27 B.C. THIRD WORLD L.J. 325, 356 (2007) ("The ideological sibling of the culture of crime is the culture of victimhood, based on a 'rhetoric of grievance' and 'ressentiment' that become part of a group's 'constitutive traits'"—both of which Inniss rejects.). To say scholars have not offered consistent characterizations of the term or fully understood its evolution over the last century would be an understatement. *See generally* Peter Goodrich, *Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389, 424 (1993) (while critiquing critical legal studies on various grounds, Goodrich seems to endorse a comparison to the American Left's general failure to command political power: A "'pervasive melancholy' … frequently interpreted as leading from politics to aesthetics—to the 'hyperinflation of aesthetic discourses'—and from activism to passivity if not *ressentiment*." What *that means*, one can only begin to guess, perhaps.).

contemplate the nuances of anger, resentments, and social constraints faced by a full majority of all Americans.

D. Strategies for Decentering Gendered, Racialized First Amendment Jurisprudence

1. Critical Legal Theories, Emotions, and Anger

The foregoing analysis of free speech doctrines' covertly gendered and racialized assumptions echoes several core premises of CLS. Borrowing Cornel West's articulation, the conclusions are geared toward the imperatives of offering "theoretical critiques of [academic] liberal paradigms" and providing bases for action by and within "radical organizations that engage in extra parliamentary action," all the while offering pragmatic lessons to legal practitioners.[102] For legal theorists broadly, exposing the gendered, racialized conceptions of emotions and anger in First Amendment jurisprudence—and how these concepts ultimately exclude all but a small minority who effectively receive even greater legal protections—invites others to envision novel, creative means of erasing such obscure inequities. The key doctrines covered under *Chaplinsky* and *Brandenburg*, for instance, might be seen as worthy of sustained efforts to eliminate or significantly narrow them; conversely, one or another might be worth *extending*, broadening the reach to capture a fuller range of experiences surveyed above. While the takeaways discussed below suggest ranges of options, not certain conclusions, they seek West's notion of giving "visibility and legitimacy" to otherwise overlooked issues in law and toward exposing "the intellectual blinders" of scholarship and practice which reify real-world inequities, damaging stereotypes, and resistant hierarchies.[103]

2. Legal Activists and Practitioners: Revive *Chaplinsky*, *Brandenburg* – or Leave Them for Dead?

For activists and practitioners, the "fighting words" doctrine of *Chaplinsky* presents two strategic possibilities looking ahead: *reviving* it, but with a more-expansive understanding of the emotions and experiences which may produce angered reactions to provoking speakers, or *killing* what remains of the dormant doctrine, suffused as it is with presumptions that exclude. Each strategy entails tradeoffs. Reviving *Chaplinsky* to include a greater range of individuals and groups' experiences would allow future plaintiffs the benefit of a First Amendment jurisprudence which actually understands how anger functions. It is not always fleeting; it can result from repressed, simmering frustrations and emanate from a collective

102. Cornel West, *The Role of Law in Progressive Politics*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 708, 711 (David Kairys, 3d ed. 1998).

103. *Id.* at 714–15.

boiling-over; and it is constrained by social norms rooted in gender, race, and other characteristics, all of which place unequal expectations on different individuals' emotional expressions. Given the Supreme Court's inconsistent framing of racist speech and conduct seen in *R.A.V. v. St. Paul* and *Virginia v. Black*, using litigation as a strategy to widen the forms of speech understood as fighting words—and thus unprotected, with a greater range of listeners' reactions viewed as reasonable—presents uncertainty. Conversely, attempts to finish off *Chaplinsky*, to finally overrule it on grounds of vagueness or its lack of workable evaluative standards, may remove a gendered, racialized doctrine from constitutional law. At the same time, doing so risks foreclosing litigation tactics in future cases where federal courts have (hypothetically) opened themselves to a more-nuanced understandings of positionality and identity.

Brandenburg's "incitement" (or "imminent lawless action") concept presents an even more complex set of considerations. The "imminence" factor—requiring incitement to produce or be likely to produce unlawful action, essentially, right after the speaker has uttered it—may militate against minority groups and individuals' interests in cases where extremist rhetoric calls for action vaguely or eventually, not imminently. This is not a hypothetical; rather, it reflects the rhetoric of far-right leaders which already has seeped into judicial analyses of their followers' violent actions, as in two 2019 cases involving Gavin McInnes, a key figure in the Proud Boys gang, whose followers were sentenced to four years each in prison after perpetrating a gang assault.[104] Those cases relate to a broader class of far-right speakers, activists, and perpetrators of violence, in the U.S. and globally, whose conduct undermines the Supreme Court's attempt to distinguish fully protected, pure political expression from unprotected forms of incitement or true threats.

To put a finer point on it, the doctrinal morass left by *Chaplinsky*, *Brandenburg*, and their combined progeny leads to questions of line-drawing: When does fiery rhetoric become an invitation to commit violence? When ought such an invitiation trigger liability? Absent the "imminence" required under *Brandenburg* or the somewhat lesser requirements of threats under *Watts*, what workable alternative standard could courts use to proscribe later-in-time threats of unlawful conduct? How are we to distinguish violent ideologies—presumptively protected, as in the Klan's white-ethnonationalist ambitions, however intrinsically genocidal—from intent, imminence, threats? These are profoundly challenging questions, and it will be a daunting task for legal scholars and practitioners. Using far-right and reactionary political actors as an example, the constellation of vocal leaders of reactionary "online subcultures," including the range of "internet trolls, anti-feminist gamers, conspiracy

104. *See* Campbell *supra* note 66 and accompany discussion.

theorists, and ideologues, such as men's rights activists and members of the so-called 'alt-right,'" exposes known entities to light; these same subcultures, after all, have "relied on the power of celebrity," not anonymity, so line-drawing questions are not patently unfeasible.[105] Even aside from cases of radicalization through online media consumption are known and traceable,[106] cases like the Proud Boys and Gavin McInnes[107] might be easier to distinguish: their speech expressly invokes violence, even if not imminently, as *the* overriding goal. The temporal distinction drawn by the Court in *Brandenburg*, much like its predication on a hair-trigger understanding of anger's temporality, cannot account for these real-life and sometimes deadly cases.

CLS and other progressive-left legal scholars typically have embraced extant, expansive First Amendment protections for reasons of principle and pragmatism alike. Giving the federal courts greater power to regulate the *content* of individuals' beliefs or speech would expose already marginalized groups to the latent and overt biases of judges and Supreme Court justices just as surely as it *could* curb rhetoric propagating violent ideologies. Indeed, for that very reason, these concluding remarks do not call into question the "free speech principle" in general.[108] After all, targeting the "mere advocacy" of the Klan's ideology through a refinement of the 1960s-era Ohio criminal syndicalism statute could, in the hands of hostile authorities or equivocal courts, open up leftist radicals to censure to the extent their "advocacy" contemplates extralegal strategies of protest and action. With these manifold challenges and pragmatic uncertainties in clearer view, plus the concerns of potential backlash in mind, the need for considerable further examination of how anger's framing in free speech claims is abundantly clear.

105. Rebecca Lewis, *"This Is What the News Won't Show You": YouTube Creators and the Reactionary Politics of Micro-Celebrity*, TELEVISION & NEW MEDIA 1, 7 (2019).

106. *Id.* at 7–8 (discussing the process of getting "red pilled," i.e., right-wing and far-right followers' "rejection of mainstream media," and thus greater acceptance of "alternative narratives," presages radicalization). *Accord* Rebecca Lewis, *Alternative Influence: Broadcasting the Reactionary Right on YouTube*, DATA & SOC'Y RES. INST., https://datasociety.net/wp-content/uploads/2018/09/DS_Alternative_Influence.pdf [https://perma.cc/6BV7-MRL6] (last visited Feb. 14, 2020).

107. Campbell, *supra* note 66.

108. This reflects a warning provided by Steven Shiffrin over 25 years ago, in which he argued against views holding the "free speech principle" as intrinsically "harmful to the left," since that "thesis does not take sufficient account of the multiplicity of power relations both in and out of the mass media" and is "too blasé about the kinds of interventions one might expect from the government." Steven Shiffrin, *The Politics of the Mass Media and the Free Speech Principle*, 69 IND. L.J. 689, 692 (1994). Even taking for granted that "conservative forces can control the market," then they also "can control the government and repress dissident movements," no less those who hope to undermine gendered and racialized First Amendment doctrines, like those surveyed above. *Id.*

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